Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-364

ROSE VIOLA NICKERSON,

Petitioner,

v.

CITY OF NORFOLK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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September 4, 1979

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IN THE

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OCTOBER TERM, 1979

No.

ROSE VIOLA NICKERSON,

Petitioner,

v.

CITY OF NORFOLK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner Rose Viola Nickerson respectfully prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Virginia entered in this proceeding on April 6, 1979, affirming, by order, petitioner's conviction in the Circuit Court of the City of Norfolk.

DECISION BELOW

The judgment of the Supreme Court of Virginia, entered April 6, 1979, without opinion, appears in the appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the City of Norfolk establish beyond a reasonable doubt that the dominant theme of the three magazines in issue was an appeal to the prurient interests of the intended recipient group, the homosexual community of the City of Norfolk, where the magazines at issue depicted nude males and simulated homosexual lovemaking and no witness testified that such conduct would appeal to the prurient interests of the recipient group?

2. Did the trial court properly instruct the jury in accordance with *Mishkin* v. *New York*?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution, which provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

The Fourteenth Amendment to the United States Constitution, which provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law.

STATEMENT OF THE CASE

By indictment filed February 1, 1978, petitioner was charged with three counts of possession with intent to sell three allegedly obscene magazines [1] in violation of Norfolk City Code §31-86. The offenses were alleged to have occurred on or about December 21 and 22, 1977, at three different bookstores located in the City of Norfolk. Petitioner was tried by a jury on August 14 and 15, 1978, before Judge Spencer G. Gill of the Circuit Court of the

[1] The magazines are attached to this Petition as Exhibits A, B, and C.

City of Norfolk. The jury found petitioner guilty on all three counts and recommended the maximum penalty for each count, a one year term of incarceration and a $1,000.00 fine. On November 17, 1978, Judge Gill denied petitioner's motion to set aside the verdict and grant a new trial, entered judgment and imposed the maximum penalty. On January 9, 1979, petitioner sought review in the Supreme Court of Virginia. Her Petition for Appeal was summarily denied on April 6, 1979, and the judgment of the Circuit Court of the City of Norfolk affirmed. On June 29, 1979, the Supreme Court of Virginia granted an enlargement of the stay of mandate pending the filing of a petition for a writ of certiorari in this Court and its action thereon.

Petitioner was the proprietor of three adult bookstores in Norfolk City, Virginia, that offered for sale adult, sexually-oriented literature. (Tr. Vol. I, 44-52,62.) These materials included books and magazines that catered to heterosexual as well as homosexual interests. (Tr. Vol. I, 66.)

On or about December 21, 1977, two vice squad officers of the Norfolk Police Department, Investigator Auer and Corporal Consolvo, entered one of petitioner's bookstores, Admiralty Bookstore, browsed through the books and magazines on display, and purchased a magazine entitled "Accent," which in their judgment was among the more sexually explicit.[2] (Tr. Vol. I, 44-46.) The two officers proceeded to another of petitioner's bookstores, Shore Drive Books, thumbed through various magazines and books and purchased a second magazine called "Suck-cess." (Tr. Vol. I, 47-49.) Finally, on or about December 22,

[2] This magazine, as well as the remaining two, was at the time of purchase wrapped in plastic so that only the front and back covers were visible to the officers. (Tr. Vol. I, 67.)

1977, the same two officers visited petitioner's third store, Discount Books, scanned the materials and purchased a magazine called "Thrust." [3] These three magazines were subsequently presented to a Norfolk City grand jury and indictments against petitioner returned.

All of the magazines at issue were designed for and primarily disseminated to homosexuals. (Tr. Vol. I, 146-150.) Each contained pictorial displays of nude or semi-nude models and simulated sexual activity.

At trial the prosecution's case-in-chief consisted of the testimony of officers Auer and Consolvo, who briefly described the purchases of the three magazines, and the allegedly expert testimony of Father Herbert Hugh Smith, Jr. An Episcopal priest, Father Smith testified that he had participated in a community relations program sponsored by the Norfolk City Police during the course of which he, among others, was shown various sexually-oriented magazines, books and films. The police had solicited his opinion as to whether the materials were an affront to contemporary community standards. At that time, he was asked whether he would be willing to voice his opinion in a court of law. (Tr. Vol. I, 95-96.) He agreed, he said, so that he could live with his conscience. (Tr. Vol. I, 97.)

Father Smith testified that over the preceding year, he had spoken with some fifty or seventy-five members of the Norfolk community "about what they found acceptable in sex — in terms of sexually explicit magazines and what they found unacceptable." (Tr. Vol. I, 97-98.) He had been furnished the magazines at issue in this case and he had discussed them with various members of the community. He informed those people that the "material . . .

[3] The activities of Officers Auer and Consolvo were part of a city-wide investigation of bookstores suspected of dealing in allegedly obscene materials. (Tr. Vol. I, 65-66.)

had been indicted." (Tr. Vol. I, 122.) He did not keep records but he felt that he had discussed the magazines with more than thirty-five people. (Tr. Vol. I, 99, 104-105. He had not made a statistical analysis and he was unable to testify as to the age, sex, race, education, marital status or sexual preference of the people to whom he had talked. (Tr. Vol. I, 101-115.) He did not ask the people with whom he spoke whether they were familiar with homosexual materials, (Tr. Vol. I, 115) nor whether the people with whom he spoke were themselves homosexuals. (*Id.*) The City presented no other evidence of standards or prurient appeal to the intended group.

When the City rested its case, petitioner moved to strike its evidence (the equivalent of a motion to dismiss) on the grounds that the City had offered no evidence, from either lay or expert witnesses, that the intended recipients of the material, homosexuals, would find them patently offensive or that their dominant theme was an appeal to the prurient interest of homosexuals. The Court denied the motion. (Tr. Vol. I 125-127.)

In her defense, petitioner presented the expert testimony of a psychologist and two Norfolk area college professors. Dr. Lawrence Donner — associate professor of clinical psychology at the University of Maryland School of Medicine, chief psychologist of the Division of Adult Ambulatory Care at the Institute of Psychiatry and Human Behavior in Baltimore, Maryland, and formerly co-director of the Institute's sex clinic — testified that over the preceding four or five months he had conducted three surveys in Norfolk City soliciting opinions with respect to sexually-explicit materials and had, in addition, visited community bookstores, libraries and theaters in order to observe the kinds of sexually-explicit materials available to the general public. Dr. Donner recited the mean age, sex, race, education and marital status of the sample surveyed and provided a statistical analysis of the results.

(Tr. Vol. I, 138-145.) Based upon his evaluation of local community standards, Dr. Donner testified that that none of the three magazines would appeal to the prurient interest of either heterosexuals or homosexuals in Norfolk City. (Tr. Vol I, 145-150.)

Joseph W. Hellinger, a professor of history at Norfolk State College and resident of Norfolk City, next testified for the defense. Professor Hellinger stated that over the past two years he had discussed with many local residents their views regarding sexually-explicit material, both heterosexual and homosexual, and that based upon such discussions it was his opinion that the materials at issue would be acceptable to those individuals who chose to read them. (Tr. Vol. I, 165-168.)

Professor Hellinger's testimony was supplemented by that of Professor Willard Frank, Jr., an associate professor of history at Old Dominion University and resident of Norfolk City. Dr. Frank had discussed the subject of sexually-explicit materials with approximately 150 Norfolk residents over the preceding four or five months, and in addition had polled his students. He testified that the results of such initiatives indicated that the materials at issue would not be patently offensive, applying contemporary community standards in the area. (Tr. Vol. II, 183-195.)

In defining obscenity and the relevant standards to be applied, the Court instructed the jury, in its instruction number 14:

> In making that determination (obscenity) you may not consider whether the magazines would appeal to the prurient interest of a particularly susceptible segment of society, as you must determine obscenity by the magazine's appeal to the prurient interest of the average person, applying the contemporary community standards of magazines with sexual content in the City of Norfolk.

In its instruction 15, the Court said:

> The first test to be applied in determining whether a magazine is obscene is whether the predominant theme of the magazine, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipient group, appeals to the prurient interest of the average person in the community *or* to the prurient interest of the members of the intended or probable recipient group.
>
> In applying this test, the question involved is not how a magazine now impresses an individual juror, but rather considering the intended probable recipient group, how the magazine would have impressed the average person or member of that group. Determination of whether the material appeals to a purient interest must be made in light of contemporary community standards of acceptance in the representation of sex and nudity. (Emphasis added.)

And in its instruction number 16, the Court told the jury, *inter alia:*

> "In deciding whether or not the magazines are obscene, you must apply these three tests as to each magazine: *FIRST* — whether the *average person,* applying contemporary community standards of the City of Norfolk, would find that the magazines, taken as a whole, appeals (sic) to the prurient interest.
>
> Prurient interest means having a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse.
>
> Contemporary community standards is (sic) that limit of candor that is accepted in the description or representation of sexual material in the City of Norfolk at the present time.
>
> *SECOND* — whether each magazine contains patently offensive representations or descriptions of sexual acts, normal or perverted, actual or simulated, or representations or descriptions of masturbation, excretory

functions, and lewd exhibition of the genitals, that exceed the contemporary community standards of acceptance of materials dealing with sex in the City of Norfolk at the present time.

THIRD — whether the magazines, taken as a whole, lack serious literary, artistic, political or scientific value. (Emphasis added.)

The jury convicted the defendant on all three counts and recommended the maximum sentence, one year in jail and $1,000.00 fine per count. That sentence was imposed by the Court on November 17, 1978. Petitioner filed a timely notice of appeal to the Supreme Court of Virginia. That Court denied the appeal on April 6, 1979.

REASONS FOR GRANTING THE WRIT

I. The City of Norfolk failed to establish that the dominant theme of the materials in issue was an appeal to the prurient interest of the intended recipients, the homosexual community of the City of Norfolk.

In *Mishkin* v. *New York*, 383 U.S. 502, 508 (1966) this Court recognized the difficulty in assessing appeal to prurient interest when materials are ". . . designed for and primarily disseminated to a clearly defined deviant sexual group. . ." The Court held that under those circumstances the prurient appeal requirement is satisfied if "the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." *Id.*

In *Mishkin*, the Court felt that it was adjusting the prurient appeal requirement to social realities. It intended to soften the "average" or "normal" person test of *Roth* v. *United States*, 345 U.S. 476 (1957) while still avoiding the inadequate "most-susceptible-person" test of *Regina* v. *Hicklin* LR 3QB 360 (1868). *Mishkin* was reasonably read by a number of circuits, however, *to require* evidence, in addition to the materials themselves, that they appealed to the prurient interest of the target group.

In *United States* v. *Klaw*, 350 F.2d 155 (2d Cir. 1965), the Second Circuit reasoned that the jury was incapable, without some evidence other than the materials themselves, of determining whether they were obscene. The material in issue displayed persons in various sadomasochistic activities, with a heavy emphasis on bondage and ligatures. The government offered no other evidence. The Court reversed, saying:

> In this case, however, the only predicate for any conclusion about prurient appeal was the material itself, as if *res ipsa loquitur*." The jurors were, therefore, left to speculate. They were invited to behold the accused materials and, in effect, conclude simply that it is undersirable, it is distasteful, it is disgusting. Knowing perhaps that they would not be interested in obtaining more of the material they might wonder why anyone else would, and conclude that the only answer is 'prurient appeal.' Because the jury was given no basis for understanding exactly how and why the material appeals to its audience, whether deviate or average person, it may too readily supply an explanation — 'prurient apeal.' Even if the jury did not consist of twelve carefully selected Anthony Comstocks, it might well believe that the predominant appeal of certain acknowledged works of art, sculture and literature found in all our well-known museums and libraries would be to the prurient interest of the average person, or perhaps someone else. But if that be so, can we allow the censor's stamp to be affixed on the basis of an uninformed jury's misconceptions? 350 F.2d at 167.

Klaw was followed by the First Circuit in *United States* v. *Palladino*, 475 F.2d 65 (1st Cir. 1973), *vacated and remanded*, 413 U.S. 916, *decision on remand*, 490 F.2d 499 (1974). The *Palladino* court broadened *Klaw* to cases involving "average prurience." 475 F.2d at 73, n.7. It rejected the limitation of expert testimony to cases involving special kinds of recipients "for most of the materials contain a mixture of 'normal' and 'deviant' appeal." *Id. Klaw* was

followed by the Eighth Circuit in *Luros* v. *United States*, 389 F.2d 200 (8th Cir. 1969), and by some states. *In re Giannini*, 69 Cal. 2d 563, 72 Cal. Rptr. 655, 446 P.2d 535 (1968); *In re Harris*, 56 Cal. 2d 879, 16 Cal. Rptr. 889, 366 P.2d 305 (1961) *vacated and remanded on other grounds*, 374 U.S. 499 (1963); *Dunn* v. *State Board of Censors*, 40 Md. 249, 213 A.2d 751 (1965).

A later decision by the Second Circuit, *United States* v. *Wild*, 422 F.2d 34 (2d Cir. 1969), was read by many to reject or severely limit *Klaw*. *Wild* involved homosexually-oriented color slides, without accompanying text, and it reaffirmed the ability of the lay jury to determine obscenity, even when materials were directed at "deviant" groups, if the material was "hard-core." *Wild* became the progenator of a line of cases rejecting or distinguishing *Klaw*. *United States* v. *Young*, 465 F.2d 1096 (9th Cir. 1973); *United States* v. *Gundlach*, 345 F. Supp. 709 (M.D. Pa. 1972); *United States* v. *Brown*, 328 F. Supp. 196 (E.D. Pa. 1971); *United States* v. *Gower*, 316 F. Supp. 1390 (D.D.C. 1970); *United States* v. *Kaehler*, 353 F. Supp. 476 (N.D. Iowa 1973).

The *Klaw-Wild*, dichotomy split the Fifth Circuit sitting *en banc*, by a majority of eight to seven in *United States* v. *Groner*, 475 F.2d 550 (5th Cir. 1972), *en banc*, 479 F.2d 577 (1973), *vacated and remanded*, 414 U.S. 969, *opinion on remand* 424 F.2d 499 (1974). The original panel in *Groner* aligned itself with those cases which had embraced *Klaw* and, like *Palladino*, expanded its holding to include expert testimony on community standards, regardless of the nature of the material. The panel felt that it was "completely incapable of applying the (obscenity) test in the instant case." 475 F.2d at 554. It stated:

> Without some guidance, from experts or otherwise, we find ourselves unable to apply the *Roth* standard with anything more definite or objective than our own personal standards of prudence and decency, standards which should not and cannot serve as a basis for either denying or granting First Amendment protection to this or any other literature. 475 F.2d at 554.

The *en banc* decision categorically rejected the panel's skepticism and, by a majority of one, rejected the requirement in the case before it. It recognized the *Klaw* line of cases, but felt they were limited to their own circumstances. 479 F.2d at 583, n.6.

At the time of this Court's decision in *Miller* v. *California*, 413 U.S. 15 (1973) and related cases, especially *Paris Art Theatre I* v. *Slaton*, 413 U.S. 49 (1973), the controversy remained unsettled. Nothing in those cases, or since then, has laid it to rest.

Paris Art Theatre I v. *Slaton*, 413 U.S. 49, 56 n.6 (1973) made it clear that experts are not required in every obscenity case. In footnote six, however, the Court cites *Wild*, *Mishkin*, and *Klaw*, *all* with approval. Refusing to disapprove any of those holdings, the Court says:

> We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest. *See Mishkin* v. *New York*, 383 U.S. 502, 508-510 (1966); *United States* v. *Klaw*, 350 F.2d 155, 167-168 (CA. 2 1965). *Id.*

Thus, *Klaw* and *Wild* both continue to have validity, In some cases, the material will speak for itself. In others, when the appeal is clearly to a "bizarre deviant" group, more evidence must be offered to establish prurience.

The circuits reacted with uncertainty to the treatment of the issue in *Paris Art Theatre I*. The *Palladino* court, having held initially that "fundamental fairness, and therefore due process, requires the intervention of experts," 475 F.2d at 72, on remand left to the District Court the decision

whether expert testimony should be required to establish the material's appeal to deviant groups. 490 F.2d at 504. Some of it was homosexual material. In *United States* v. *2,200 Paperback Books*, 565 F.2d 566 (9th Cir. 1977), the court affirmed the District Court's holding that, in a civil forfeiture action, the government failed to prove material obscene because it provided no evidence of contemporary community standards and because the District Court's own limited experience was insufficient for it to make the determination for the material in question.

The Ninth Circuit recognized that *Paris Art Theatre I* did not require affirmative evidence and that normally the need for expert testimony does not arise "as it is assumed that a trier of fact (be it judge or jury) is familiar with the sensitivity of the average person in the community." 565 F.2d at 570. In the case before it, however, the judge, trying the case without a jury, informed all parties that he was unfamiliar with the current contemporary community standard due to his limited contact with the area both professionally and otherwise. Under those circumstances the government failed to meet its burden when it provided no evidence other than the materials themselves.

Like the judge in *2,200 Paperback Books*, juries of normal healthy heterosexuals have no basis upon which to determine the obscenity of explicit sexual material designed for the homosexual viewer. Petitioner submits that this case demonstrates the necessity for this Court to rationalize *Mishkin*, *Klaw* and *Wild* and assist courts in the ever-increasing controversy over homosexually oriented material. In the instant case, the City's purported expert conceded that he had no experience, expertise or information which would assist the jury in making the necessary evaluation. To request the lay jury to make that determination without the assistance of evidence on the issue is akin to expecting a jury to disregard inadmissible evidence that the defendant committed a crime. "Discrimination so subtle is a feat be-

yond the compass of ordinary minds." *Shepard* v. *United States*, 290 U.S. 96, 104 (1933); *Bruton* v. *United States*, 391 U.S. 123(1968).

Although inclusion of homosexuals in the category of medically "deviant" groups may no longer be accepted, it cannot be gainsaid that the average juror considers homosexual sex practice to be deviant. To most citizens, the act of homosexual lovemaking is undoubtedly obscene. This Court has held, however, that "sex and obscenity are not synonymous." *Roth* v. *United States*, 354 U.S. 476, (1957). If depiction of lovemaking and eroticism by heterosexuals is not obscene, without more, then lovemaking or erotic behavior by homosexuals is not, without more, obscene. To be obscene, material depicting the male body, homosexual erotic behavior, or even actual or simulated lovemaking by homosexuals must appeal to the prurient interest of the average homosexual. It must be morbid and shameful. *Roth* v. *United States*, 354 U.S. at 487, n.20. The materials at issue in this case, on their face, cannot be said to have a dominant appeal to that interest of the average homosexual. Without the assistance of persons more knowledgeable about the issue than a jury of ordinary heterosexual persons, there was no basis upon which to conclude that the material satisfied the tests of *Mishkin* and *Miller*. To permit the jury to return a verdict under these circumstances deprived petitioner of her rights under the First Amendment and to due process of law guaranteed to her by the Fourteenth.

II. The Court failed to instruct the jury in accordance with Mishkin v. New York.

The instructions to the jury failed to explain in a clear and concise manner that the materials were to be evaluated by their effect on their probable recipient, the homosexual reader. In instructions 14 and 16, the Court referred solely to the average citizen. In instruction 15, the Court informed

the jury that it was to determine whether the materials appealed to the prurient interest of either the average person in the community or the members of the intended or probable recipient group. Even if that instruction had been correct, it was immediately contradicted by instruction 16 which referred only to the "average person." Even instruction 15, however, incorrectly states the *Mishkin* principle. It permitted the jury to convict if it determined the material to appeal to the prurient interest of *either* the average citizen or the intended recipient. *Mishkin* and its progeny require proof beyond a reasonable doubt that the material appeals to the recipient group, not that group *or* the average citizen.[4] *See, e.g., United States* v. *Ewing*, 445 F.2d 945, 947 (10th Cir. 1971); *United States* v. *Palladino*, 490 F.2d 499, 501 (1st Cir. 1974).[5] Unless the jury is so instructed, it is unable, even with necessary evidence, to prevent its own disgust for the materials and the shame and morbidity it may feel from affecting its judgment as to the prurient interest the materials arouse, if any.

---

[4] See also *Manual Enterprises* v. *Day*, 370 U.S. 478 (1962).

[5] The point is one of great constitutional significance. A magazine advertising spring fashions in women's shoes, for example, may not be deemed constitutionally prurient because it appeals to the shameful sexual interests of the average foot fetishist. This is because individuals with foot fetishes are not the target group of such advertizing magazines. Thus, proper *Mishkin* instructions make it clear to the jury that determinations of prurience may be made *only* from the perspective of the intended recipient. See, *e.g.*, Schauer, *The Law of Obscenity*, Appendix B at 308 (model instruction):

> Deviant Groups
>
> There has been evidence atempting to show that the intended and probable recipients of the material in question were members of a deviant sexual group, to wit: . . . . If you find that this was the case, then you are to determine whether the material appeals to the prurient interest in terms of the average member of that deviant group, *and not the average person in the community*. (Emphasis supplied.)

Compare *Pinkus* v. *United States*, 436 U.S. 293, 302 (1978).

CONCLUSION

This Court has yet to decide whether explicit sexual material which appeals to the homosexual requires evidence, lay or expert, beyond the face of the material itself, to establish its obscenity. This case presents the appropriate vehicle for providing guidelines to federal and state courts now faced with the issue. Petitioner respectfully requests that a writ of certiorari issue to correct the error committed below.

Respectfully submitted,

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APPENDIX

April 19, 1979

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 6th day of April, 1979.

Rose Viola Nickerson, Appellant,

against Record No. 790046
Circuit Court No. M1334-78

City of Norfolk, Appellee.

From the Circuit Court of the City of Norfolk

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Richard R. Brink
Deputy Clerk

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

DOCKET NO. 79-364

ROSE VIOLA NICKERSON

Petitioner,

v.

CITY OF NORFOLK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PERTINENT PROVISIONS OF THE UNITED STATES CONSTITUTION, STATUTES OF VIRGINIA AND ORDINANCES OF THE CITY OF NORFOLK

The Respondent adopts Petitioner's statement of the pertinent provisions.

QUESTIONS PRESENTED

I. Did the City of Norfolk properly establish that the obscene material appealed to the prurient interest of the intended and probable recipients?

II. Did the trial court properly instruct the jury in accordance with Mishkin v. New York?

STATEMENT OF THE CASE

The Petitioner was tried under three (3) misdemeanor indictments charging her with possession with intent to sell three (3) obscene magazines on December 21 and 22, 1977, in the City of Norfolk, in violation of Norfolk City Code Section 31-86. The three (3) magazines were all homosexual-oriented. Petitioner was tried on August 14 and 15, 1978.

The City's principal witnesses were Investigator S. F. Auer who testified that he purchased the three (3) magazines from three (3) different bookstores owned by the Petitioner; Charles Gibson, Director of Business Licenses for the City of Norfolk, who testified that Petitioner had obtained the business licenses for the three (3) stores; and Herbert Smith, an expert on contemporary community standards in the City of Norfolk, who testified that the three (3) magazines offended Norfolk's contemporary community standard.

After the City rested its case, Petitioner moved to strike the evidence and entered a judgment of acquittal, which the Court denied. The Petitioner called three (3) witnesses who testified that the magazines did not offend Norfolk's contempory community standard. One witness also testified that the intended and probable recipients of the mazagines were homosexuals and that in his opinion the magazines did not appeal to their prurient interest.

On August 15, 1978, at the conclusion of the case, the jury returned a verdict of guilty on all three indictments, and set punishment at three thousand dollars ($3,000.00) and three (3) years in jail. Sentence was pronounced and judgment entered by the Court on November 17, 1978.

Petitioner filed a notice of appeal to the Supreme Court of Virginia on December 18, 1978. On January 9, 1979, Petitioner filed a "Petition for Appeal" in that Court.

That Court denied the appeal on April 6, 1979.

In the instant Petition for a Writ of Certiorari to this Court, Petitioner raises and argues two issues. The first is that "The City of Norfolk failed to establish that the dominant theme of the materials in issue was an appeal to the prurient interest of the intended recipients, the homosexual community of the City of Norfolk." This issue was not raised or argued by Petitioner in her "Petition for Appeal" to the Supreme Court of Virginia, and was not considered by that Court. It is argued for the first time on the instant Petition before this Court. The second issue is that "The Court failed to instruct the jury in accordance with Mishkin v. New York." This issue was raised and argued before, and considered by, the Supreme Court of Virginia.

I. THE CITY OF NORFOLK PROPERLY ESTABLISHED THAT THE MATERIAL APPEALED TO THE PRURIENT INTEREST OF THE INTENDED AND PROBABLE RECIPIENTS.

In Mishkin v. New York, 383 U.S. 502 (1966), this Court adjusted the prurient appeal requirement of the obscenity test by permitting the requirement to be met where material appealed to the prurient interest of its "intended and probable recipient group." Id. at 509.

Thereafter, this Court, in Paris Adult Theatre I v. Slayton, 413 U.S. 49 (1973) held that "expert" affirmative evidence that materials were obscene was not required when the materials "themselves were actually placed in evidence." The materials were the "best evidence of what they represent."

> 'In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient in

> themselves for the determination of the question....' This is not a subject that lends itself to the traditional use of expert testimony.... [I]ndeed the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony.... 'Simply stated, hard core pornography can and does speak for itself....' Id. at 56; N. 6.

The Court did, at footnote 6, reserve judgment where material, "on the extreme case... where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." Id.

The Petitioner argues that the instant case falls within this language, and that the trial court erred in sustaining the verdict where no expert testimony established that the materials appealed to the prurient interest of male homosexuals. This argument

fails for several reasons.

First, in the instant case, this Court is not faced with the problems suggested by the Court in Paris Adult Theatre I of reviewing materials "directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." Id. No claim has been made by the Petitioner at trial stage or before this Court that adult male homosexuals constitute a "bizarre deviant group" within our society, nor is there any evidence before the Court which would support any such contention. Petitioner concedes in her Petition that the "inclusion of homosexuals in the category of medically 'deviant' groups may no longer be accepted...." Petitioner's Brief for Certiorari at 13, Nickerson v. Norfolk (October Term, 1979). Indeed, Petitioner's own expert witness at trial testified that homosexuals, as the "probable

...viewer[s] or recipient[s] or purchaser[s] of the magazine[s]" (Tr. Vol. I, 146), were not a "deviant group":

> THE WITNESS: Yes, Your Honor. The American Psychiatric Association, the other major professional mental health associations four years ago took homosexuality, per se, out of the diagnostic category as a deviation. It's no more a deviation than heterosexuality is. If a person is unhappy being homosexual or unhappy being heterosexual, then there is a problem, but, per se, heterosexuality--homosexuality is not a deviance or a sickness. (Tr. Vol. I, 152.) (Emphasis added.)

See: People v. Young, 143 Cal. Rptr. 604 (1977).

Rather, the materials in the instant case parallel those which were before the Court in U.S. v. Wild, 422 F.2d 34 (2nd Cir., 1969), cert. den. 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152 (1971). In Wild, the subject materials consisted of two groups of color slides, the first showing in various poses a nude male holding or touching

his erect penis, and the second portraying two nude males in the act of fellatio. As in Wild, there can be no possible claim of any value in the instant materials other than the titillation of the erotic interests of the class or group at whom they are aimed. From the nature of the materials, and from the evidence, there is no doubt as to what that class or group is, and what the materials are intended to do. Expert testimony in the instant case, as in Wild, could have done no more than restate the obvious and to that extent would have been superfluous. See: U.S. v. Young, 465 F.2d 1096 (9th Cir. 1972) for parallel holding.

Petitioner relies heavily on U.S. v. Klaw, 350 F.2d 155 (2nd Cir. 1965) in which the Court required expert testimony. While such testimony was perhaps necessary in Klaw, that case presented peculiar problems of proof not found in the instant case, nor in Wild. Klaw involved allegedly obscene

booklets containing stories, drawings, and photographs in the "bondage" genre, described to the Court as "sado-masochistic". Id. at 157. In describing the problems confronting a jury which had to judge obscenity without any evidence other than the booklets themselves, the Court stated:

> ...the jury had insufficient evidence even to 'recognize' that the material appealed to the prurient interest of the average person. It had absolutely no evidentiary basis from which to 'recognize' any appeal to the prurient interest of the deviate or the typical recipient--a class never really defined in the record. Id. at 168.

As in Wild, the class or group of recipeints in the instant case is clearly defined. The materials were sufficient bases for deciding appeal to the prurient interest of that group. See: Wild, supra, N. 1. Even if we assume in some cases that the trier of fact might be un-

qualified without the use of expert testimony to judge whether the material appeals to the prurient interest in sex, the present case is not such a case. While the average juror may not find the instant materials sexually arousing, the average juror is qualified by experience to conclude that such materials do appeal to the prurient interest of a substantial number of individuals. The materials are not directed at a "bizarre deviant group" as to require expert testimony. Paris Art Theatre I, supra; and see: State v. Grabill, 34 Or. App. 639, 579 P.2d 316 (1978); State v. Tidyman, 30 Or. App. 537, 568 P.2d 666 (1977).

Secondly, assuming arguendo that it was error not to have an expert, the only possible harm which could result from this omission would be suffered by the prosecution; not by the Petitioner. The prosecution runs the risk that some of the jurors would find

that the matter was not obscene because they were sickened or disgusted, rather than finding the material "stimulating the erotic" (Mishkin, supra, at 502, 508), because the jurors were not themselves homosexuals. People v. Young, supra.

Lastly, while the Petitioner appealed the instant conviction to the Supreme Court of Virginia, the present issue was not raised in that appeal. The highest Court of Virginia was not given opportunity to consider and rule on this matter. Hence, Petitioner has avoided a ruling from the State's highest Court and is, in effect, attempting to "bootstrap" this issue into the Supreme Court of the United States. Consequently, this Court lacks jurisdiction to review this matter by writ of certiorari. 28 U.S.C. §1257(3); Norfolk & Suburban Turnpike Co. v. Virginia, 225 U.S. 264 (1912).

II. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY IN ACCORDANCE WITH MISHKIN V. NEW YORK.

The Petitioner argues that the Court erred in improperly instructing the jury on the law concerning the prurient interest appeal to members of the intended or probable recipient group. This position is without merit.

The trial court granted Instruction No. 15 which comported with the requirements set forth by this Court in Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (1966). In Mishkin it was held that in dealing with books which appealed to "unconventional" sexual interest, the test for obscenity was met if the books appealed to the prurient interest of the members of the deviant group for whom the materials were intended. This is to be contrasted with books appealing to conventional sexual interest in which case the test is met if the book appeals to the prurient interest of the

"average" person in the community. Instruction No. 15 provided that:

> The first test to be applied in determining whether a magazine is obscene is whether the predominant theme of the magazine, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipient group, appeals to the prurient interest of the average person in the community or to the prurient interest of the members of the intended or probable recipient group.
>
> In applying this test, the question involved is not how a magazine now impresses an individual juror, but rather considering the intended probable recipient group, how the magazine would have impressed the average person or member of that group. Determination of whether the material appeals to the prurient interest must be made in light of contemporary community standards of acceptance in the representation of sex and nudity. Instruction No. 15. (Emphasis added.)

This Instruction clearly states the law as set forth in Mishkin.

Petitioner's argument that it was error for the Court to permit the jury to convict if it determined the material to appeal to the prurient interest of either the average citizen or the intended recipient is groundless. Such an agrument flies in the face of Mishkin, which stands for this very proposition. And see: People v. Young, supra, and U.S. v. Groner, 494 F.2d 499 (5th Cir. 1974).

Lastly, Petitioner argues that the Court erred because Instructions 14 and 16 refer solely to the average person. This argument fails for several reasons. First, Instructions 14 and 16 were submitted for use to the trial court by the Petitioner herself. She cannot later claim to be prejudiced by her own Instructions. Secondly, Petitioner made no timely objection to these Instructions at trial, but raised them for the first time after the verdict was rendered. Since timely objection was not made, her objection

may not be entertained on appeal. U.S.C.S. Rules of Court, Supreme Court, Rule 23(1)(f); Rule 5:21 of the Rules of the Supreme Court of Virginia; Horner v. Holt, 187 Va. 715, 47 S.E.2d 365 (1948).

CONCLUSION

The City properly established that the material appealed to the prurient interest of the intended and probable recipients:

1. The material itself was introduced into evidence, and it "can and does speak for itself." Paris Adult Theatre I, supra.

2. The intended and probable recipients are male homosexuals, and not a "bizarre deviant group." Therefore, the trier of fact requires no expert evidence on the element of prurient appeal. Id.

Further, this Court lacks jurisdiction to review this issue because the Supreme Court

of Virginia was not given an opportunity by the Petitioner to first consider it. 28 U.S.C. §1257(3).

The trial court properly instructed the jury in accordance with Mishkin v. New York, supra:

1. The trial court instructed the jury that prurient appeal must be considered in relation to the average person in the community or to the prurient interest of the members of the intended or probable recipient group. This falls squarely within Mishkin.

2. Petitioner may not attack Instructions 14, 15, and 16 on appeal because (a) they were submitted to the trial court by Petitioner herself, and (b) Petitioner made no timely objections to these instructions at trial.

For these reasons, the Respondent respectfully urges that the Petition for a Writ of Certiorari be denied and that Petitioner's conviction be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Brief in Opposition to Petition for a Writ of Certiorari upon counsel of record for the Petitioner, Roger E. Zuckerman, Esquire, Zuckerman, Spaeder & Taylor, 1800 M. Street, N.W., Suite 375 North, Washington, D. C., 20036, pursuant to the requirements of Rule 33 of the Rules of the Supreme Court of the United States, by depositing same in a

United States mail box, with first class postage prepaid, addressed to counsel of record for the Petitioner as set forth above, on or before October 2, 1979.

I further certify that I am a member of the bar of this Court, and that all parties required to be served have been served on or before October 2, 1979.

Benjamin W. Bull

BENJAMIN W. BULL

Of counsel for
Respondent